

No. 48131-6-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, APPELLANT

V.

BRENTON A. SMITH, RESPONDENT

Appeal from the Superior Court of Mason County
The Honorable Judge Amber L. Finlay

No. 15-1-00248-1

BRIEF OF APPELLANT

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A. INTRODUCTION

In this case, an officer contacted the defendant, Brenton Smith, after the officer encountered Smith dancing in the street and blocking the officer's passage. Because Smith continued to dance in the street and blocked the passage of the officer's patrol car even after Smith made eye contact with the officer, the officer arrested him for disorderly conduct. In a search incident to arrest, the officer discovered controlled substances. As a result, the State charged Smith with possession of controlled substances.

Prior to trial, Smith brought a motion to suppress the evidence discovered during the search incident to arrest, alleging that the officer lacked probable cause to arrest him for disorderly conduct. The trial court agreed with Smith, finding that because Smith was impaired when he blocked the officer's passage, the officer lacked probable cause to believe that Smith's act of blocking the officer's passage was intentional. Therefore, the trial court granted the defense motion, suppressed the evidence, and dismissed the case.

Although there may be other issues which neither party raised below, the only issue actually raised, and the only basis of the trial court's

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conclusions of law, was that, in effect, the trial court held that mere impairment negates the element of intent in the instant case. The State alleges error with the trial court's conclusions of law and asks this court to reverse the orders suppressing evidence and dismissing the case and to remand this case for resolution of any remaining issues and for trial on the merits.

B. ASSIGNMENTS OF ERROR AND ISSUE PERTAINING TO
ASSIGNMENTS OF ERROR

- 1) The State contends that Conclusion of Law No. 2 is error; and,
- 2) The State contends that Conclusion of Law No. 3 is error.

Issue: Does mere impairment, or mere impairment to an unspecified degree, negate the element of intent for purposes of probable cause?

C. FACTS AND STATEMENT OF THE CASE

On May 30, 2015, Officer Auderer of the Shelton Police Department was on patrol when he encountered the defendant, Robert Smith, walking back and forth in the middle of the roadway. RP 3-4. There were sidewalks on both sides of the road, but Smith was walking

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down the middle of the road rather than using either of the sidewalks. RP 4. Officer Auderer had to bring his patrol car to a stop to avoid hitting Smith. RP 6.

Officer Auderer waited in the roadway, for about five seconds, while he watched Smith "doing a strange pseudo-type dance or just kind of moving oddly in the middle of the roadway" while eating Pringles and blowing crumbs. RP 6. Officer Auderer was unable to proceed because Smith was blocking his path, while "[t]ransiting kind of back and forth, [and] just shifting about." RP 7. Initially, Officer Auderer thought it might have been a simple jaywalking, but as he watched he realized that something else was going on because Smith made eye contact him but nevertheless continued the behavior for a protracted period of time. RP 8. Officer Auderer testified that Smith "realized that there was a police officer stopped in the middle of the road behind him" but "remain[ed] in the middle of the road" nonetheless. RP 9-10.

Officer Auderer parked his patrol car in the middle of the roadway and approached Smith. RP 9-10. Upon contact with Smith, Officer Auderer observed signs of what he believed to be methamphetamine intoxication. RP 10-11. After making contact with him, Officer Smith

then arrested Smith for disorderly conduct (CP 17), “[b]ecause [Smith] was blocking traffic and standing in the middle of the roadway.” RP 11.

Smith was wearing a backpack when Officer Auderer arrested him. CP 17. Incident to the arrest, Officer Auderer searched the backpack. CP 17. The search revealed a methamphetamine pipe, several baggies that contained trace amounts of methamphetamine, and “4 sealed packages of 12mcg/hr transdermal Fentanyl patches which are a CSA schedule II narcotic.” CP 17. Based on these facts, the State charged Smith with one count of a violation of RCW 69.50.4013(1), possession of a controlled substance. CP 29.

Smith brought a motion to suppress the evidence, contending that the search incident to arrest was unlawful because Officer Auderer did not have probable cause to believe that Smith had committed a crime. CP 24-27. The trial court concluded as a matter of law that:

Officer Robert Auderer did not have probable cause to arrest Mr. Smith for disorderly conduct because Mr. Smith appeared to be under the influence of methamphetamine and therefore did not have the intent to obstruct vehicular traffic.

CP 5 (Conclusion of Law No. 2). Having found that Officer Auderer lacked probable cause for the arrest, the trial court then found that “Officer

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Robert Auderer did not have lawful authority to search Mr. Smith incident to the arrest.” CP 5 (Conclusion of Law No. 3). The trial court suppressed the evidence (CP 5) and dismissed the case, finding that the suppression order had “the practical effect of terminating the case.” CP 3.

D. ARGUMENT

The trial court ruled that there was no probable cause for the arrest of Smith because Smith exhibited signs of impairment at the time of his arrest and that, therefore, the arresting office lacked probable cause for the element of intent. *Issue: Does mere impairment, or mere impairment to an unspecified degree, negate the element of intent for purposes of probable cause?*

a) *Standard of Review*

A trial court’s conclusions of law in an order pertaining to a suppression motion are reviewed de novo on appeal. *State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293 (1996).

b) *Mere impairment, or mere impairment to an unspecified degree, does not negate the element of intent for purposes of probable cause.*

Proof of the crime of disorderly conduct in the instant case requires the State to prove beyond a reasonable doubt that Smith intentionally

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obstructed vehicular or pedestrian traffic without lawful authority. RCW 9A.84.030(1)(c). The trial court ruled that Officer Auderer did not have probable cause to arrest Smith for disorderly conduct because, the court reasoned, since it appeared that Smith was under the influence of methamphetamine, he therefore “did not have the intent to obstruct vehicular traffic.” CP 5 (Conclusion of Law No. 2).

“‘Intent’ exists only if a known or expected result is also the actor's ‘objective or purpose.’” *State v. Bea*, 162 Wn. App. 570, 579, 254 P.3d 948 (2011), quoting *State v. Caliguri*, 99 Wn.2d 501, 506, 664 P.2d 466 (1983) (citing RCW 9A.08.010(1)(a)). But “[w]here there is no direct evidence of the actor's intended objective or purpose, intent may be inferred from circumstantial evidence.” *Bea* at 579 (citations omitted). Additionally, “[a] jury may infer criminal intent from a defendant's conduct where it is plainly indicated as a matter of logical probability.” *Id.*, citing *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997) (further citations omitted). “This includes inferring or *permissively* presuming [emphasis added] that a defendant intends the natural and probable consequences of his or her acts.” *Bea* at 579, citing *Caliguri*, 99 Wn.2d at 506 (further citations omitted).

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Probable cause for an arrest exists when “the facts and circumstances within the arresting officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in a belief that an offense has been ... committed.” *State v. Herzog*, 73 Wn. App. 34, 53, 867 P.2d 648 (1994) (quoting *State v. Fricks*, 91 Wn.2d 391, 398, 588 P.2d 1328 (1979)). “A person can be intoxicated and still able to form the requisite intent.” *State v. Thomas*, 123 Wn. App. 771, 780-81, 98 P.3d 1258, 1263 (2004), citing *State v. Gabryschak*, 83 Wn. App. 249, 921 P.2d 549 (1996).

“Many criminal acts follow the use of alcohol or drugs.” *State v. Finley*, 97 Wn. App. 129, 135, 982 P.2d 681 (1999). But the mere fact that one is impaired by drugs is not sufficient to negate the element of intent; instead, there must be evidence from which to reasonably and logically conclude that impairment caused the defendant to be unable to form the requisite intent. *Thomas*, 123 Wn. App. at 780-81; *Finley*, 97 Wn. App. at 135; RCW 9A.56.020(1)(a).

With the possible exception of the allegation that Smith was frolicking in the road and was intentionally blocking traffic while spitting Pringle crumbs into the air, the only evidence before the trial court about

the degree of Smith's intoxication was Officer Auderer's testimony that Smith exhibited signs that included "[r]apid, shifty behavior, display of bruxism in the jaw, answering questions or making comments before you're done asking what you were going to ask[,]” and that he moved like a parakeet. RP 11. For the purposes of analyzing whether impairment negated the element of intent in this case, the facts here are similar to those in the case of *State v. Gabryschak*, 83 Wn. App. 249, 921 P.2d 549, (1996). In *Gabryschak*, the reviewing court found that there was ample evidence that the defendant was intoxicated, but found “no evidence in the record from which a rational trier of fact could reasonably and logically infer that Gabryschak was too intoxicated to be able to form the required level of culpability to commit the crimes with which he was charged.” *Id.* at 254.

The same is true here, where the record shows that there is ample evidence that Smith was intoxicated, but there is no evidence to show that his level or degree of intoxication had any effect, nor even that his intoxication was capable of having any affect, on his ability to form the requisite intent for the crime of disorderly conduct. At most, one can speculate that perhaps Smith might not have engaged in the behavior of

blocking traffic had he not been impaired, but the long-standing rule is that merely being impaired does not excuse criminal behavior. *State v. Mriglot*, 88 Wn.2d 573, 576 n. 2, 564 P.2d 784 (1977); *see also*, *State v. Runnells*, 64 Wn.2d 995, 995-96, 390 P.2d 1003 (1964)(approving a jury instruction stating that: "If an intoxicated person has the capacity to form an intent to commit the crime charged herein and conceives and executes such an intent, it is no defense that he was induced to conceive it, or to conceive it more suddenly by reason of his intoxication.").

Our Supreme Court has reasoned that "mere sauntering or loitering on a public way is lawful and the right of any man, woman, or child." *City of Seattle v. Webster*, 115 Wn.2d 635, 642, 802 P.2d 1333 (1990)(internal quotation marks and further citations omitted). But this pronouncement neither negates nor emphasizes the element of intent. Still more, Smith's behavior in the instant case was more than mere sauntering, or in other words, his behavior was more than mere walking in a slow or relaxed manner. Here, Smith was frolicking in the middle of the roadway and blocking Officer Auderer's passage, and he continued to do so even after making eye contact with him. RP 6-8.

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The instant case is substantively similar to the case of *State v. Greene*, 97 Wn. App. 473, 983 P.2d 1190 (1999). *Greene* is distinguished from the instant case because the issue in *Greene* was whether the City of Seattle's pedestrian interference ordinance conflicted with the state's disorderly conduct statute. *Id.* But *Greene* is helpful to analysis of the issue of intent and probable cause in the instant case because the facts of *Greene* involved the question of whether Greene acted with the requisite criminal intent when he stepped into the path of a moving patrol car. *Id.* at 478.

An officer testified that Greene was looking at them when he stepped into the roadway and blocked their passage. *Id.* This fact is distinguishable from the instant case because here Smith was already frolicking in the roadway when Officer Auderer came upon him. RP 4. But the facts are substantively similar for the purpose of analyzing the element of intent because here Smith made eye contact with Officer Auderer, but he nevertheless continued to dance in the roadway while blocking Officer Auderer's passage. RP 6-8. On review, the court in *Green* found that on similar facts "[t]he record contain[ed] substantial

evidence that the officers had probable cause to believe that Greene intended to obstruct traffic.” *Greene* at 478.

The State contends that, similar to *Greene*, there is substantial evidence in the instant record that, even if Smith’s primary purpose was to merely dance in the street while impaired, he nevertheless intentionally blocked Officer Auderer’s passage. RP 6-8. And in any event, the mere fact of intoxication does not by itself negate the element of intent. *State v. Mriglot*, 88 Wn.2d 573, 576 n. 2, 564 P.2d 784 (1977); *see also*, *State v. Runnells*, 64 Wn.2d 995, 995-96, 390 P.2d 1003 (1964).

D. CONCLUSION

The trial court here ruled as conclusions of law that merely because there was evidence that Smith was probably impaired when he frolicked in the roadway, the officer could not have probable cause to believe that Smith’s obstruction of vehicular traffic was intentional. The sole issue on review is whether on these facts mere impairment negates the element of intent. The State contends that mere impairment, or the mere probability of impairment to some unspecified degree, does not negate the element of intent. Accordingly, the State asks this Court to reverse the

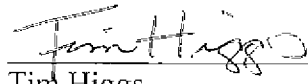
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trial court's orders suppressing evidence and dismissing this case, and the State asks this Court to remand this case for trial on the merits.

DATED: January 25, 2016.

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A handwritten signature in cursive script, appearing to read "Tim Higgs", is written over a horizontal line.

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